United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7476

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B

P/S

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff-Appellant-Cross-Appellees,

against

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,

Defendants-Appellees-Cross-Appellants,

and

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN, as Executors of the Estate of Leo Stern, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, HARRY B. FRANK and JEROME TARNOFF, as Executors of the Estate of Ned D. Frank, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, a Partnership, (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman) and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims-Appellants-Cross-Appellees.

Appeal from a Judgment of the United States District Court for the Southern District of New York

BRIEF OF ADDITIONAL DEFENDANT ON COUNTERCLAIMS-APPELLANT-CROSS-APPELLEE ROBERT S. PERSKY

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New York Partnership Law

"Section 98. Rights, powers and liabilities of a general partner

(1) A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to...(b) Do any act which would make it impossible to carry on the ordinary business of the partnership...."

PRELIMINARY STATEMENT

Following the instructions to avoid duplication of argument in briefs submitted by parties whose interests overlap additional defendant on counterclaims, Robert S. Persky, adopts the brief submitted by Paul, Weiss, Rifkind, Wharton & Garrison on behalf of Finley Kumble, Wagner, Heine, Underberg and Grutman, the brief on jurisdiction submitted by Osmond K. Fraenkel, Esq. on behalf of various counterclaim defendants and the brief submitted by Paul Risher, pro se on the issue of damages.

This memorandum will, therefore, be limited to the issue of whether the court below was correct in holding that the transfer of assets to the plaintiff corporation, by Newburger, Loeb & Co., (the "Partnership") was invalid because of a failure to comply with Section 98(1)(b) of the Partnership Law of the State of New York.

The issue in terms of specific fact is whether a consent, at the time of the transfer, by defendants Mabel Bleich ("Bleich") and Jeanne Donoghue ("Donoghue"), as limited partners, was required in order to have a valid transfer of assets.

The issue of law treated herein was obscured at trial and in the opinion below by extraneous facts relating to who gave the opinion letter, the question of when the Rosenman firm first indicated it would not give the opinion, why the Rosenman firm permitted its clients to sign the transfer agreement and the charges of bad faith and conspiracy alleged by each group of aligned parties against the other.

The three points of this brief take the position that:

(1) The Restated Articles of Limited Partnership (Defendant's Ex. U) (the "Partnership Agreement") delegated to both the general partners and the executive committee the power to terminate the Partnership and under the law of New York the further consent of Bleich and Donoghue was not required.

(2) The undisputed fact that the New York Stock Exchange ("NYSE") had stated in writing (Pl. Ex. 1) that it would suspend the Partnership and thereby cause it to cease business was the act which made it impossible for the Partnership to carry on its ordinary business and that the transfer of assets, under that circumstance, did not require the consent of Bleich and Donoghue.

(3) The purpose of Section 98(1)(b) was not frustrated by the transfer of assets and, therefore, the consent of Bleich and Donoghue was not required.

I

THE TRANSFER WAS NOT MADE WITHOUT THE WRITTEN CONSENT OF BLEICH AND DONOGHUE.

Under the holding of Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) the court below was required to apply the law of New York to the issue of the validity of the transfer of assets.

The only case in point, Mist Properties, Inc. v. Fitzsimmons Realty Co., (not off. rep) 228 N.Y.S.2d 406 (Sp. Ct. Kings Co. 1962) dealt with the issue of whether there was compliance with Section 98(1)(b) if the Partnership Agreement itself permitted the general partners to convey the assets of the Partnership. Judge Hart held that there was compliance and that no public policy had been violated by incorporating "written consent" in the Partnership Agreement.

The Partnership Agreement (Defendant's Exhibit U) (A-E 412) specifically permitted the general partners to terminate the Partnership sooner than its expiration date of December 31, 1971.

> "Term
>
> 2.1 The term of the partnership...shall expire December 31, 1971 unless sooner terminated by consent of the General Partners, given as provided in paragraph 4.1 below."

Paragraph 4.1 is a broad delegation to the general partners to "Carry on, manage and have full control of the partnership business." and Paragraph 4.3 delegates to the executive committee, composed of general partners, all of the authority vested in the general partners.

The Partnership Agreement had been signed by Bleich and Donoghue and under Mist Properties (supra) no further written consent was required

for a valid approval of the transfer (sic, a termination) by either the executive committee or the general partners. There is no dispute that both the remaining general partners and the executive committee approved the transfer of assets.

The transfer of assets was, therefore, not without the written consent of all the limited partners and the judgment entered below should be reversed.

II

THE TRANSFER OF ASSETS WAS NOT THE ACT THAT MADE IT IMPOSSIBLE TO CARRY ON THE ORDINARY BUSINESS OF THE PARTNERSHIP.

The ordinary business of the Partnership was the business of a member of the NYSE.

The underlying and undisputed act which led to the transfer of assets was the written statement by the NYSE that it would require the Partnership to cease its business in the event the reorganization was not consummated (Pl. Ex. 1)(A-E 1)

Bleich and Donoghue are simply wrong in claiming that it was the transfer of the assets which made it impossible for the partnership to carry on its ordinary business. Had the transfer not taken place, the NYSE would have made it impossible to carry on the business of the Partnership!

Is the position of Bleich and Donoghue so fatuous that they claim the transfer would have been valid twelve hours later, after the NYSE suspended the Partnership and closed it down?

All of the partners and limited partners were aware, at the time the Partnership Agreement was executed, that the NYSE was the ultimate authority as to whether it could carry out its ordinary business. That fact was memorialized in the Partnership Agreement which provided in Paragraph 12.2 (Def. Ex. U) that the Rules of the NYSE could supercede and thereby without further act of either general or limited partners amend the Partnership Agreement(A-E 450)

The court below was in error in holding that the transfer of assets was the act that made it impossible to carry on the ordinary business of the

Partnership. For all practical and legal purposes the ordinary business of the Partnership had ceased at the close of business of the NYSE on the day of the transfer. It had already been determined by the NYSE that the ordinary business would cease if the transfer did not occur!

III

SECTION 98(1)(b) IS NOT APPLICABLE TO A PARTNERSHIP IN FINANCIAL DISTRESS.

Section 98(1)(b) has as its purpose the protection of limited partners from the general partners.

In the instance of a profitable business there is a sound rationale for requiring written consent prior to an act of general partners making it impossible to carry on the ordinary business of the Partnership.

The logic lies in the fact that it is usually the financial contribution of the limited partners that has provided the funds required to make the business viable. To permit the general partners to use the limited partners' funds until a profitable business is achieved or the funds of the limited partners are no longer necessary and then to take an act, without consent, to make it impossible to carry on the ordinary business of the partnership would be to give a license to the general partners to freeze out the limited partners. The general partners could then continue the business in a second entity having achieved success on the backs of the limited partners.

In the instant case the Partnership was in financial distress. The dispute over the value of the Gross Partnership account tended, at trial, to obscure the more pervasive and undisputed fact that the Partnership was and had been, for several years, in financial distress. This court need not be reminded of the fact that from 1969 - 1971 many NYSE member firms were in financial distress and ultimately found it impossible to carry on their ordinary business.

There is no logic to the argument that the New York legislature intended to give a "Russian" veto to the limited partners which could prevent the general partners from taking acts which would cause a partnership losing money from ceasing its ordinary business. Was it the intent of the draftsmen of Section 98(1)(b) to force a losing business to continue at the whim of a limited partner? The logical answer is no!

On the facts herein the court below should have applied the maxim cessante ratione legis, cessat et ipsa lex...the reason of the law ceasing, the law itself also ceases.

Section 98(1)(b) should be held to have ceased to be applicable to the Partnership since the reason for the law had ceased to exist when the Partnership entered its prolonged and terminal period of financial distress.

CONCLUSION

Judgment in favor of Gross, Bleich and Donoghue against plaintiff and additional defendants on counterclaims, insofar as it is based on the alleged invalid transfer of assets, should be reversed on the grounds that the transfer of assets was not made in violation of Section 98(1)(b).

Respectfully submitted,

Robert S. Persky, pro se

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AFFIDAVIT OF
SERVICE BY MAIL

STUART D. LEVY, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 224-01 KINGSBURY AVE, BAYSIDE, N.Y. 11364

On February 3, 1977 deponent served the within Brief upon Paul, Weiss, Rifkind, Wharton & Garrison, 345 Park Avenue, New York, New York 10022; Golden, Weinshienk & Mandel, 10 East 40th Street, New York, New York 10016; Kantor, Shaw & Davidoff, P.C., 200 Park Avenue, New York, New York 10017; Paul D. Risher, 200 Park Avenue, New York, New York 10017; Leon Baer Borstein Shaw & Stedina, 350 Madison Avenue, New York, New York 10017; Martin E. Silfen, P.C. & Bondy & Schloss, Esqs., 545 Fifth Avenue, New York, New York 10017; Gold, Farrell & Marks, Esqs., 595 Madison Avenue, New York, New York 10022; Osmond K. Fraenkel, Esq., 120 Broadway, New York, New York 10005; Lawrence Berkowitz, 10612 Ohio Avenue, Los Angeles, California 90024, the attorneys for all of the parties hereto, by depositing a true copy of same in an official depositary under the exclusive care and custody of the United States Post Office in the State of New York.

Stuart D. Levy
STUART D. LEVY

Sworn to before me this
3rd day of February, 1977

Cecilia M. Labita
Notary Public

CECILIA M. LABITA
NOTARY PUBLIC, State of New York
No. 30-2225371
Qualified in Nassau County
Commission Expires March 30, 1977